

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

KATALIN K. NYITRAI,

Appellant,

v.

STARLETA K. OLEA,

Respondent.

No. 39281-0-II

UNPUBLISHED OPINION

Penoyar, C.J. — Katalin K. Nyitrai appeals an order dismissing her contract claim against Starleta K. Olea and awarding Olea attorney fees. She claims that the trial court erred in construing the contract against her as the drafter. We reverse and remand because the trial court explicitly stated that it was not making a credibility determination, even though the evidence was disputed, and thus it could not as a matter of law decide that Nyitrai drafted the contested leases and thereby construe them against her.

Facts

Nyitrai, the lessor, entered into two lease agreements with Olea for adjacent commercial property in Longview, Washington. These leases both contained conflicting language for the termination date. Each lease said that its term was “Three years” but the described ending date was four years plus two weeks in the first lease and three years plus three months in the later

lease.<sup>1</sup> Clerk's Papers (CP) at 53, 56; Ex. 1, 2. Olea vacated the premises after three years on November 30, 2006, and Nyitrai sued her for unpaid rent through the November 30, 2007 termination dates. After Nyitrai and Olea testified as part of the plaintiff's case, the trial court found as undisputed that both leases were internally inconsistent and it ruled, as a matter of law, that even without any credibility determinations, it needed to construe the leases against Nyitrai as the drafter and dismissed her cause of action.

analysis

CR 41(b)(3) allows the defendant to move for dismissal at the end of the plaintiff's presentation of her evidence "on the ground that upon the facts and the law the plaintiff has shown no right to relief." The rule then instructs the trial court:

The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a).

CR 41(b)(3). After Nyitrai rested, Olea moved to dismiss. The trial court granted the motion, ruling:

This Motion to Dismiss is, I think, just like a Summary Judgment Motion,

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<sup>1</sup> The Suite A lease provided:

The term of this Lease shall be for Three years commencing the 15 day of November 2003 and shall terminate on the 30 day of November 2007.

Ex. 1. The Suit B lease provided:

The term of this Lease shall be for Three years. commencing the 1st day of September 2004 and shall terminate on the 30th day of November 2007.

Ex. 2.

and ought to be treated the same way.

Are there any facts that are in dispute? These facts are not in dispute. These are the facts that, to my understanding, are not in dispute: two separate leases, signed at two separate times, for two separate suites in the same building, apparently adjacent. The leases are internally inconsistent. They're internally inconsistent.

Both parties agree that the leases are intended to end at the same time. Both parties agree that that's true, which is a little different than my reading.

The second lease, on its face, can be considered an independent agreement; but, the parties are stipulated (sic) that it's not, and so I'm not going to treat it as independent, I'm going to treat them as part of the same agreement.

And, then, the question is: Where the leases are inconsistent, internally inconsistent, is there a rule of law that goes without -- without weighing the credibility of any -- any witness? My understanding of the rule of law is without weighing credibility, if there are inconsistencies in a written agreement, they're construed against the drafter, and in this case, that's the Plaintiff. She drew them up. They're inconsistent, and she's the drafter, and that gives the option to interpret to the Defendant, as a matter of law.

So, I'm granting the Motion to Dismiss.

Report of Proceedings (RP) at 66-67. The trial court also entered finding of fact and conclusions of law. The following are relevant to our discussion below:

[Finding of Fact] 2.4 The Plaintiff drafted the lease to Suite A and now argues that the lease was for four years (48 months). The Defendant (lessee) argues that the lease was for three years (36 months).

[Conclusion of Law] 3.1 The rule of law in the State of Washington is without weighing credibility, if there are inconsistencies in a written agreement, the agreement is construed against the drafter, and in this case that is the Plaintiff.

[Conclusion of Law] 3.2 The court having found that both leases have internal inconsistencies and finding that the Plaintiff is the drafter, the court adopts the interpretation of the Defendant as a matter of law.

CP at 133. The court then awarded judgment to Olea as well as costs and attorney fees.

I. Standard of Review

On appeal from the grant of a motion to dismiss at the close of the plaintiff's evidence, the standard of review is as follows: If the court viewed the evidence most favorably to the plaintiff, we are limited to determining whether there is any evidence or reasonable inference from it to establish a prima facie case as a matter of law; if, however, the court in deciding the motion weighed the evidence and entered findings of fact, we will accept the findings if substantial evidence supports it. *Nelson Constr. Co. of Ferndale, Inc. v. Port of Bremerton*, 20 Wn. App. 321, 326-27, 582 P.2d 511 (1978).

Here, while the trial court stated that it was treating this as though it were a summary judgment motion, it clearly did not. The trial court made a finding that Nyitrai drafted the lease agreements and thus it construed those agreements in Olea's favor. The evidence presented at trial was disputed as to who drafted the contracts and the trial court could have weighed the witnesses' credibility and resolved the issue. *See N. Fiorito Co. v. State*, 69 Wn.2d 616, 618-20, 419 P.2d 586 (1966). Here, each party claims the other either wrote or dictated the disputed terms. Thus, absent the trial court making a credibility determination, it could not conclude as a matter of law that Nyitrai was the drafter. Hence, we must reverse and remand this matter.

II. Attorney Fees

Both parties request attorney fees on appeal as the commercial leases contained applicable attorney fees provisions. Nyitrai is the prevailing party on appeal and we award her costs and attorney fees upon her compliance with RAP 18.1.

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We reverse and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Van Deren, J.